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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 829

BERNARD B. BAILEY,

Petitioner,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

BERNARD B. BAILEY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

BERNARD B. BAILEY,

Petitioner,

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions this Honorable Court for Writ of Certiorari, to review the judgment of the Supreme Court of Apeals of Virginia entered in the above entitled cause on December 6, 1943, the opinion of the Court (R. 33) being reported in 182 Va. 70, 27 S. E. (2nd) 914.

Summary and Short Statement of Matter Involved.

The petitioner seeks a review of two rulings shown in the opinion of the Court below (R. 33), (1) that the respondent, in constructing a highway under his general power of

eminent domain, was authorized to destroy the operation of the petitioner's grist mill even though it was admitted that the destruction could reasonably be avoided, and (2) that the petitioner had no right to challenge the Virginia statute which authorizes the respondent to take property, after making a deposit of what he thinks it is worth, and to construct a highway on the property and, within sixty days after completion of the construction of the highway, to institute condemnation proceedings, and that therefore it was unnecessary to pass on the constitutionality of the statute.

In the petitioner's bill of complaint to enjoin the highway construction it was alleged (R. 21-29), and the respondent by his demurrer admitted (R. 30), that a State highway runs in front of the petitioner's mill; that the mill is operated by means of an over-shot water wheel; that the wheel is supplied with water flowing through a mill race, which runs in a winding course at the foot of a steep hill on the petitioner's property and connects with a stream of water; that the respondent decided to relocate and reconstruct the highway on a new course running back of the mill, through the race, and through the adjacent hill; that the petitioner protested because the construction of the new highway would materially interfere with and finally destroy the operation of the mill; that disregarding the protests the respondent, on October 13, 1941, notified the petitioner that a certificate of deposit was being filed with the Circuit Clerk for the petitioner's benefit in order that work might proceed in the construction of the highway through the petitioner's property; and that on October 16, 1941, the forces of the State Highway Department entered the petitioner's property and began the excavations through the hill adjacent to the mill race.

On October 21, 1941 (R. 21), the petitioner filed his bill praying for an injunction against the unlawful construction

of the highway and for a decree declaring unconstitutional the statute under which the respondent, after filing the certificate of deposit, seized and mutilated the petitioner's property.

A demurrer to the bill was sustained by the trial court on November 25, 1942 (R. 31), more than a year after the bill was filed. Petition for appeal was filed with the Supreme Court of Appeals of Virginia on February 18, 1943 (R. 21), and the appeal was granted on March 5, 1943 (R. 21). On June 17, 1943, while the appeal was pending and one year and eight months after the property was seized and mutilated, the respondent instituted proceedings to condemn the property (R. 40, petition for rehearing). On December 6, 1943, the decree of the trial court was affirmed by the judgment which the petitioner now seeks to have reviewed (R. 37). On January 5, 1944 (R. 38), a petition for rehearing was filed. On January 25, 1944 (R. 52), the petition for rehearing was denied.

Statement as to Jurisdiction

Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the jurisdiction of this Court are as follows:

Sec. 237(b) of Judicial Code, as amended by Act of Feb. 13, 1925, c. 229; 43 Stats. 937; U. S. C. A. Tit. 28, Sec. 344(b);

Act approved Feb. 13, 1925, c. 229, Sec. 8(a); 43 Stat. 940; U. S. C. A. Tit. 28, Sec. 350.

Rulings of the Court and Statute of Virginia the Validity of Which Is Involved.

Ruling Authorizing Operation of Mill to be Destroyed (R. 34-36):

> "The appellant next contends that his property, being a grist mill, is not subject to condemnation for high-

way purposes, because, he says, it is devoted to a public use, and the statute (Acts 1940, ch. 380, p. 666, Sec. 1, Michie's Code of 1942, Sec. 1969j(1), which vests the State Highway Commissioner with the power of eminent domain, does not expressly or impliedly authorize him to condemn property devoted to a public use.

"It is true that ordinarily power to condemn property devoted to a public use must be manifested either by express legislative authority or by necessary implication * * * it is clear that the appellant's property is not devoted to a public use within the meaning of the rule which he seeks to invoke.

"In 18 A. Jur., Eminent Domain, Sec. 94, p. 720, it is said: 'To exempt property from condemnation under a general grant of the power of eminent domain, it is not enough that it has been voluntarily devoted by its owner to a public or semi-public use. If the use by the public is permissive and may be abandoned at any time, the property is not so held as to be exempt. The test of whether or not property has been devoted to public use is what the owner must do, not what he may choose to do.'

"See, also, Lewis, Eminent Domain, 3d Ed., Sec. 445; New York, L. & W. Ry. Co. v. Union Steamboat Co., 99 N. Y. 12, 1 N. E. 27; Diamond Jo Line Steamers v. City of Davenport, 114 Iowa 432, 87 N. W. 399, 54 L. R. A. 859; Vermont Hydro-Electric Corp. v. Dunn, 95 Vt. 144, 112 A. 223, 12 A. L. R. 1495; East Bay Municipal Utility District v. City of Lodi, Cal. App., 6 P. 2nd 325; 120 Cal. App. 740, 8 P. 2nd 532; State v. Superior Court of King County, 54 Wash. 365, 103 P. 469, 104 P. 175.

"In Vermont Hydro-Electric Corp. v. Dunn, supra, 112 A. at page 226, it is said: 'But a mere voluntary assumption of public service which may be abandoned at any time does not carry with it the privilege of exemption. The test whether land is held for a public use such as will exempt it from condemnation is said not to be what the owner does or may choose to do,

but what under the law he must do, and whether a public trust is impressed upon it.'

"While in this State a grist mill may be affected with a public interest, and so long as it remains in operation it must serve the public in a manner which is regulated to some extent by statute (Code, Se. 3594, as amended by Acts 1920, ch. 386, p. 574, Acts 1932, ch. 421, p. 886; Code, Sec. 3595), there is no obligation on the owner to continue such operation. He may at any time devote his property to an entirely different use or sell or otherwise dispose of it. In other words, such public service as he performs is purely voluntary and may be abandoned at any time by him.

"In our opinion the State Highway Commissioner clearly has the power to condemn the property in question."

STATUTE OF VIRGINIA ALLOWING POSTPONEMENT OF CONDEMNATION PROCEEDINGS.

Virginia Acts 1922, ch. 403, Sec. 10, last paragraph, as amended by Acts 1940, ch. 380, Sections 4 and 6; Va. Code 1942, Sections 1969j(4); 1969j(6).

Section 1969j(4), Va. Code 1942, provides as follows:

"In addition to the exercise of the power of eminent domain, as provided hereinabove, the Commissioner is hereby authorized to enter upon and take possession of such property and rights of way, for the purposes set out in Section 1969j(1), as the Commissioner may deem necessary, and proceed with the construction of such highway. Within sixty days after the completion of the construction of such highway, if the Commissioner and the owner or owners of such lands are unable to agree as to compensation and damages, if any, caused thereby, the said Commissioner shall institute condemnation proceedings as hereinbefore provided; and the amount of such compensation and damages, if any, awarded to the owner in such proceedings shall be paid out of the State highway fund, the said Commissioner to pay to the land owner or into court,

or to the Clerk thereof, for his benefit such sum as he shall estimate to be fair value of the land taken and damage done, before entering upon such land for construction purposes, provided such payment shall in no wise limit the amount to be allowed under proper proceedings. It is the intention of this Section to provide that such property and rights of way may, in the discretion of the Commissioner, be condemned after the construction of the highway, as well as prior thereto, and to direct the fund out of which the judgment of the court in condemnation proceedings shall be paid, and to provide that in all other respects the provisions of this Act shall apply whether the property and rights of way are condemned before or after the construction of the highway, but the authorities constructing such highway under the authority of this Section shall use diligence to protect growing crops, pastures, and to prevent damage to any property not taken. So far as possible, all rights of way shall be acquired or contracted for before any condemnation is resorted to."

Section 1969j(6), Virginia Code 1942, provides in part as follows:

"A certificate issued by the State Highway Commissioner and counter-signed by the Treasurer of Virginia, stating that any sum or sums of money designated therein will be paid pursuant to the order of any court or courts wherein the condemnation proceedings under the provisions of this Act are pending, when filed with the said court or courts, shall be deemed and held for the purpose of this Act to be payment into the custody of such court or courts. * * *"

Ruling Denying Right to Attack Statute (R. 36-37).

"The final contention of the appellant is that that part of the statute (Acts 1940, ch. 380, p. 666, Sec. 4, Michie's Code of 1942, Sec. 1969j(4) which authorizes the Highway Commissioner to enter upon and take possession of the property, and, 'within sixty days after the completion of the construction of such highway', to

institute condemnation proceeding to acquire title to the property so taken, violates the due process clause of the Fourteenth Amendment to the Federal Constitution and the due process clause of section 58 of the Constitution of Virginia.

"Specifically, the contention is, that the statute does not authorize the institution of condemnation proceedings until sixty days after the completion of the construction of the highway; that such construction might be indefinitely delayed; and that consequently the property owner might be unreasonably delayed in being compensated for the taking of his property or the damage done thereto. See Bragg *v.* Weaver, supra; McGibson *v.* County Court of Roane County, 95 W. Va. 338, 121 S. E. 99; Simms v. Dillon, 119 W. Va. 284, 193 S. E. 331, 113 A. L. R. 787.

"We find it unnecesasry to pass upon this contention. It is stated in the brief of the Attorney General, and not denied by the appellant, that since the present proceeding has been pending in this court the highway has been completed and condemnation proceedings to acquire title to the apellant's property have been instituted. By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right of the State Highway Commissioner to condemn the property in question. Since we are of opinion, for the reasons stated, that such property is subject to condemnation for State highway purposes, the appellant is now afforded a prompt remedy in such proceedings for obtaining just compensation for his property taken or damaged. It is unnecessary, then, for us to decide what would have been his rights if the payment of such compensation had been unreasonably delayed. Nor does it concern him that the statute complained of might violate the rights of others. Unless he can show that he has been damaged by the operation of the statute, the constitutional question which he seeks to raise is moot as to him. See Grosso *v.* Commonwealth, 177 Va. 830, 839, 13 S. E. 2nd 285, 288; Morgan *v.* Common-

wealth, 168 Va. 731, 737, 191 S. E. 791, 793, 111 A. L. R. 62; Premier-Pabst Sales Co. *v.* Grosscup, 298 U. S. 226, 227, 56 S. Ct. 754, 755, 80 L. Ed. 1155."

NATURE OF CASE AND RULINGS BELOW BRINGING CASE WITHIN JURISDICTIONAL PROVISIONS RELIED ON, AND CASES SUSTAINING JURISDICTON.

Final Decree by Highest Court of Virginia.

The decree of the Court below (R. 37) was final because it affirmed the final decree of the trial court which sustained the demurrer to the bill of complaint and ordered that the bill be stricken from the record. The final decree of the trial court (R. 31) recites: "* * * the court doth adjudge, order and decree that the demurrer be and the same now hereby is sustained, and this cause be and the same now hereby is stricken from the docket and this decree is final, and thereupon the complainant excepted to the ruling of the court in sustaining the said demurrer." It recites further: "And the complainant having signified his intention of applying to the Supreme Court of Appeals of this State for an appeal from this final decree, the court doth further order, adjudge and decree that the operation of this final decree is suspended for a period of 90 days from this date, and the complainant is granted a period of 15 days from the date of the entry of this decree within which period the complainant is to enter into an appeal bond * * *." Thus the cause was not left standing in the trial court but was stricken from the record. The decree of the Supreme Court of Appeals (R. 37) recites: "It is therefore adjudged, ordered and decreed that the same be, and is hereby, affirmed * * *." (*Mo. & Kan. Int. Ry. Co.* v. *City of Olathe, Kan.*, 222 U. S. 185.)

The decree of the Supreme Court of Appeals of Virginia, which the petitioner seeks to have reviewed, was rendered

by the highest Court of the State in which a decision could be had. (Virginia Constitution, Sections 87, 88.)

Federal Question Raised after Ruling Authorizing Operation of Mill to Be Destroyed.

The decree of the Court below involves the destruction by the respondent of the operation of the petitioner's grist mill. Under the Virginia statutes the petitioner's mill is (a) required to serve the public and to grind the grist in turn (Va. Code 1942, Sections 3594 and 3595; Appendix, post pp. 66, 67), (b) limited to a statutory maximum charge for grinding the customer's grist (ibid), (c) subject to general supervision, control and regulation by the State Corporation Commission of Virginia (ibid, Sec. 3594a; post p. 67), and (d) protected and aided by the petitioner's statutory power, as owner, upon payment of just compensation, to flood the lands of others if necessary to sustain and facilitate the operation of the mill (ibid, Sections 3582-3589; post p. 65).

The bill alleged, and the demurrer admitted, that the construction of the new highway through the mill race and the adjacent hill would destroy the operation of the mill, and that the respondent could construct an acceptable highway on the existing course in front of the mill without destroying the operation of the mill (Paragraphs 7 and 14 of bill, R. 24-25, 28; R. 30). The petitioner relied upon, and presented to the Court, the rule that the operation of an enterprise devoted to a public use cannot be destroyed by eminent domain unless the power is expressly granted or necessarily implied (Par. 15 of bill, R. 28; Point 2 in petition for appeal, R. 6, 7). The petitioner contended that under this rule the respondent is not empowered to destroy the operation of the petitioner's mill because the mill is devoted to a public use, the respondent has only a general power of eminent domain, and the power to destroy is not

necessarily implied because it is not reasonably necessary to destroy the operation of the mill since an acceptable highway could be constructed without affecting the mill (Par. 15 of bill, R. 28; Points 3, 4, and 5 of petition for appeal, R. 7-12).

The Court recognized that according to the allegations in the bill, admitted by demurrer, the construction of the new highway as planned by the respondent would result in a complete breakdown of the race and a permanent stoppage of the operation of the mill, and that this result could be avoided by a different construction of the highway, (R. 34) but held that the respondent had the power to go ahead with the destruction because the petitioner himself could at any time stop the operation of the mill (R. 36).

On December 6, 1943, the judgment of the Court was entered (R. 37). On January 5, 1944, the petitioner filed a timely petition for rehearing (R. 38), in accordance with the statute requiring that "petition for rehearing be filed within thirty days after the entry of the judgment" (Va. Code 1942, Sec. 6372). On January 25, 1944, the petition for rehearing was denied (R. 52). Thus, the time for making application for writ of certiorari runs from January 25, 1944. (*Gypsy Oil Co.* v. *Leo Bennett Escoe*, 275 U. S. 498; *Pfister* v. *Fin. Corp.*, 317 U. S. 144, 149; *Leishman* v. *Assoc. Elec. Co.*, 318 U. S. 203, 205.)

In the petition for rehearing, the petitioner specially set up and claimed that in allowing the respondent to destroy the operation of the mill without a showing of necessity merely because the petitioner had the power to do so, the Court denied to the petitioner the equal protection of the laws "in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States" (R. 51-52). The petitioner set up and claimed at the earliest opportunity the Federal question relating to equal protection of the laws. (*Brinkerhoff-Faris Co.* v.

Hill, 281 U. S. 673, 677, 678; *Great Northern Ry Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 366, 367).

Since the trial court, in its final decree, gave no reason for sustaining the demurrer to the bill (R. 31), the petitioner had no reason for contending in the petition for appeal that the trial Court's ruling denied to the petitioner the equal protection of the laws. It is true that the decisions upon which the Court below relied (*New York, L. & W. R. Co.* v. *Union Steamboat Co.*, 99 N. Y. 12; *Diamond Joe Line Steamers* v. *City of Davenport*, 114 Iowa 432; *Vermont Hydro-Electric Corp.* v. *Dunn*, 95 Vt. 144; *East Bay Mun. Util. Dist.* v. *City of Lodi*, 6 P. 2nd (Cal. App.) 325; *State* v. *Superior Court of King County*, 54 *Wash.* 365) (R. 35), were for the most part well seasoned at the time the petitioner filed his bill. There was no reason, however, for the petitioner to contend in the Court below that if the Court should enunciate a principle of law based upon the dicta found in these decisions rendered by courts in other states the Court would deny to the petitioner the equal protection of the laws. *Herndon* v. *Georgia*, 295 U. S. 441. The petitioner was "as slow as are men generally to borrow trouble of the future" (295 U. S. 441, 448).

Federal Question Raised with respect to Statute Authorizing Postponement of Condemnation Proceedings, and Refusal of Court to Pass on it.

In the bill of complaint, the petitioner alleged that the statute (ante p. 5) violates due process because it allows the condemnation proceedings to be postponed by the respondent for an unreasonable length of time after the property is taken (Par. 12 of bill; R. 27), and the bill prayed, inter alia, for a decree declaring the statute unconstitutional (R. 29). In the petition for appeal, the petitioner alleged that the statute (ante p. 5) violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that in the taking of his property under

the statute and in the arbitrary and unauthorized manner set forth the petitioner was deprived of his property without due process of law contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the petitioner prayed that the Court enter a decree to that effect (R. 20). The Court said in its opinion (R. 36; ante p. 6): "The final contention of the appellant is that that part of the statute * * * which authorizes the Highway Commissioner to enter upon and take possession of the property, and, 'within sixty days after the completion of the construction of such highway,' to institute condemnation proceedings * * * violates the due process clause of the Fourteenth Amendment to the Federal Constitution * * *." The Court held that the petitioner could not attack the statute because he was not damaged by the operation of the statute (R. 36-37; ante p. 7).

In the timely petition for rehearing (see ante p. 10), the petitioner requested the Court to pass on the constitutionality of the statute (R. 44), and the petition for rehearing was denied (R. 52). (*Gypsy Oil Co.* v. *Leo Bennett Escoe, supra; Pfister* v. *Fin. Corp., supra; Leishman* v. *Assoc. Elec. Co., supra.*)

Contention with respect to Right to Attack Statute, and Rulings thereon.

In the bill the petitioner attacked the statute (ante p. 5) on the ground that it allows the condemnation proceedings to be postponed by the respondent for an unreasonable time after taking the property (Par. 12 of bill; R. 27). In the demurrer to the bill the respondent alleged, as one of his grounds, that the petitioner did not show in the bill that he had been injured by the statute, and therefore had no right to attack the statute (R. 30-31).

In the petition for appeal the petitioner contended that the test of the invalidity of the statute is whether it allows

the respondent an unreasonable time in which to institute proceedings without authorizing the petitioner to act freely and promptly on his own motion if he chooses, and the petitioner cited *Bragg* v. *Weaver*, 251 U. S. 57, and other authorities, in support of this contention (Point 6; R. 12-14). The petitioner also contended in the petition for appeal that in challenging the statute he did not contend, and that it was not necessary to contend or show, that at the time his bill was filed the respondent had waited an unreasonable time; and he contended that when the respondent seized and mutilated his property under the authority conferred by the statute he was deprived of the right to act freely and promptly on his own motion and of the right to compel the respondent to act promptly, and that he was deprived of these rights by the statute itself and not by any delay on the part of the respondent (Point 7; R. 18-19). These contentions were completely ignored by the Court.

As the ground for holding that the petitioner was not damaged by the operation of the statute, the Court said that it was stated in the brief of the Attorney General that after the appeal was pending (and it should be noted that the appeal was not pending until March 5, 1943, when the appeal was granted, R. 21; and the property was seized and mutilated on October 16, 1941, R. 27, par. 13 of bill) the respondent instituted condemnation proceedings, which afforded the petitioner a prompt remedy (R. 36-37; ante p. 7). The Court did not even mention the restraint imposed upon the petitioner by the statute during the period of at least one year and five months while the respondent was mutilating the property and at the same time postponing the filing of condemnation proceedings, although it was apparent from the record and from the Attorney General's statement that the restraint and the mutilation continued for that period of time.

In the timely petition for rehearing (see ante p. 10), the petitioner repeated his contention with respect to the restraint imposed by the statute, and pointed out that the respondent did not institute the proceedings until June 17, 1943, which was one year and eight months after he seized and mutilated the petitioner's property (R. 39-40, 43-44). The petition for rehearing was denied on January 25, 1944 (R. 52). (*Gypsy Oil Co.* v. *Leo Bennett Escoe, supra; Pfister* v. *Fin. Corp., supra; Leishman* v. *Assoc. Elec. Co., supra*).

Whether the Court correctly held that the petitioner had no right to raise the Federal question concerning the validity of this statute is a matter that is reviewable by this Court (*Great Northern Ry.* v. *Washington*, 300 U. S. 154). The purported ground put forward by the Court for the refusal to decide the constitutional question was unsubstantial and illusory because the Court evaded (a) the fact that the petitioner was deprived by the statute of the right to act freely and promptly on his own motion when his property was seized and mutilated, and (b) the fact that the restraint continued for at least one year and five months, actually one year and eight months, while the respondent continued to mutilate and use the petitioner's property. The petitioner may, therefore, invoke the jurisdiction of this Court to decide the question whether the statute assailed is in violation of the due process clause of the Fourteenth Amendment (*Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276, 282, 283; *Brown* v. *Miss.*, 297 U. S. 278, 287).

Statement of Grounds for Contention that Questions Involved are Substantial.

Question Relating to Destruction of Operation of Mill.

Although the respondent represents the Commonwealth of Virginia, he is subject to the rule that the operation of

an enterprise devoted to a public use can not be destroyed by the power of eminent domain unless the power is expressly granted or necessarily implied (*Adirondack Ry. Co.* v. *N. Y. State*, 176 U. S. 335; *U. S.* v. *Southern Power Co.*, Cir. Ct. App. 4th Cir., 31 F. (2d) 852). The petitioner recognizes (a) that whether the respondent has the power to destroy the operations of public service enterprises is a matter to be determined by the Commonwealth of Virginia, (b) that the operations of grist mills can be expressly condemned where, because of the character of their water power operations, they would interfere with the accomplishment of a water power project designed for the public benefit (*Mt. Vernon-Woodberry Cotton Duck Co.* v. *Ala. Interstate Power Co.*, 240 U. S. 30), and (c) that the respondent could be given absolute discretion in determining whether it is necessary to destroy the operations of public service enterprises (*Rindge Co.* v. *Los Angeles County*, 262 U. S. 700). But the petitioner presented to the Court below the averments to the effect that the Court discriminated against the petitioner in such a way as to deny to him equal protection of the laws in that the Court vested in the respondent absolute discretion in determining whether to destroy the operation of the petitioner's grist mill, which is regulated by the State, for the sole reason that the petitioner may stop the operation of his mill without obtaining the State's permission. These averments present a substantial constitutional question (*Zucht* v. *King*, 260 U. S. 174, 176, 177).

Question Relating to Statute Authorizing Postponement of Condemnation Proceedings.

Under the power of eminent domain, possession of property may be taken and the property may be mutilated before condemnation proceedings are instituted, if the owner is left free to act on his own motion (*Bragg* v. *Weaver*, 251 U. S. 57; *Joslin Mfg. Co.* v. *City of Providence*, 262 U. S.

668); but the bill contained averments to the effect that the statute (ante p. 5) violates due process because it allows the respondent to take possession of and mutilate property by highway construction and to postpone the filing of condemnation proceedings until sixty days after completion of the highway, and that this is an unreasonable period of time (R. 27), and the petition for appeal contains averments to the effect that the statute violates due process because it vests in the respondent absolute discretion to delay the bringing of condemnation proceedings until sixty days after the completion of the highway and denies to the petitioner the right in the meantime to act promptly on his own motion or to compel the respondent to do so (R. 13, 18, 20). These averments present a substantial constitutional question (*Bragg* v. *Weaver, supra; Joslin Mfg. Co.* v. *City of Providence, supra; McGibson* v. *Roane County Court*, 95 W. Va. 338).

Question Relating to Right to Attack Statute.

The grounds upon which the petitioner was denied the right to raise the Federal question with respect to the validity of the condemnation statute (ante p. 5) also present a substantial Federal question. The petitioner was restrained by the statute before he filed his suit. Because the petitioner protested against unnecessary destruction of the operation of his mill and resisted the statutory restraint by filing his suit after the respondent seized and mutilated the property is no reason for saying that the petitioner was not restrained by the statute after the suit was filed. The respondent released the petitioner from restraint by instituting proceedings during the pendency of the petitioner's suit so that it can not be said that the petitioner's suit prevented the respondent from releasing the petitioner from the statutory restraint. Because the Court passed over, without noticing, this unconstitutional feature of the stat-

ute, it held in effect that the petitioner was not damaged by the operation of the statute even though he was held in restraint by the statute until the respondent released him after waiting one year and eight months. The holding of the Court was unsubstantial and illusory (*Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276, 282, 283; *Brown* v. *Miss.*, 297 U. S. 278, 287).

In order to attack the statute it was not necessary for the petitioner to apply to the Court for mandamus to compel the respondent to act, or to apply for a remedy on his own motion, because the statute on its face (ante p. 5) relieves the respondent from the duty to institute proceedings until sixty days after completion of the highway and confers upon the respondent the discretion to determine the exact date within that time for instituting proceedings. (*Smith* v. *Cahoon*, 283 U. S. 553).

Questions Presented.

1. Is it a denial of the equal protection of the laws, guaranteed by the Fourteenth Amendment to vest in the respondent the power to destroy unnecessarily the operation of the petitioner's grist mill, which is regulated by statute and supervised and controlled by the State Corporation Commission of Virginia, for the sole reason that the petitioner himself, without obtaining permission from the State, could destroy the operation of his grist mill?

2. Does the Virginia statute (ante p. 5) mean that the respondent is not under a duty to institute condemnation proceedings until sixty days after completion of the construction of the highway, and that the owner in the meantime has no right to compel the respondent to institute proceedings or to act freely and promptly on his own motion if he chooses to do so; and if that is the meaning of the statute, is it in violation of the due process clause of the Fourteenth Amendment?

3. Has the petitioner been injured by an unconstitutional feature of the Virginia statute (ante p. 5)?

Reasons Relied On for Allowance of Writ.

There are special and important reasons in this case for granting a review on writ of certiorari. The questions involving equal protection and due process are far-reaching in the law of eminent domain, in the law affecting the operations of public service enterprises, and in the field of administrative discretion and control. As between different types of public service enterprises, to what extent may administrative discretion be exercised without denying equal protection of the laws? In the eminent domain procedure for the ascertainment and payment of just compensation, how far may administrative discretion and control be extended without violating due process? The Court below avoided the question of due process. As to the question of equal protection, the decision of the Court below is not in accord with decisions of this Court involving applicable principles. (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Smith* v. *Cahoon*, 283 U. S. 553; *Hill* v. *Texas*, 316 U. S. 400; *Skinner* v. *Oklahoma*, 316 U. S. 535) No decisions of this Court on the precise questions involved in this case have been found.

This case is one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties." (*Layne and Bowder Corp.* v. *Western Wells Works*, 261 U. S. 387). In the handling of grain the petitioner's grist mill operations are small when compared with the operations of grain warehouses (*Munn* v. *Illinois*, 94 U. S. 113), but if the decision of the Court below is a correct statement of the law the operations of grain elevator companies and of all other regulated enterprises not "impressed with a trust" and terminable without the State's permission may be administratively destroyed in

the exercise of eminent domain without a showing of necessity even when the question of necessity is raised and when the absence of reasonable necessity is admitted by the one who exercises the power. This would be the rule even when the power is being exercised by one public service enterprise against another, since the Court recognized that the rule relating to the taking of property devoted to a public use is applied where the taking is by another public service enterprise (R. 35). The rule would apply where the enterprise exercising the power, as well as the enterprise subjected to the power, could be terminated without the State's permission. The decision of the Court below introduces, therefore, a new and discursive principle, important and disconcerting to a large group of public service enterprises.

Because of the statute in question (ante p. 5) the respondent has the power to seize and mutilate land and to compel the owner to accept the amount offered for it or to wait for his money until sixty days after the mutilation is completed. The harshness and unfairness of this procedure is obvious to any court. The average owner is helpless. He is unable, as the petitioner was unable (R 27-28; par. 13 of bill) to put up the bond that would be required to stop the State from exercising its sovereign power during the time required for a trial court to decide the issue. Rather than face the delay due to the highway construction and the cost and delay of litigation, and rather than run the risk of having an improper valuation made of the land taken because of the disfigurement made by the mutilation, the owner usually accepts the amount offered, which enables the respondent to dictate the terms of settlement.

The only defensive weapon left to the owner is an injunction suit without an interlocutory restraining order, which is no more effective in stopping the respondent than is a rifle in stopping a tank. The petitioner waited thirteen

months for the trial court to pass on the demurrer to his bill. (Bill filed October 21, 1941, R. 21; demurrer sustained November 25, 1942, R 31). In that time, the respondent with his tremendous construction forces was able to mutilate the property beyond recogition.

The respondent has imposed this drastic procedure upon the land owners of Virginia even after a vehement condemnation of the same procedure by the highest court of the adjoining State of West Virginia. (*McGibson* v. *Roane County Court, supra.*) While the petitioner can not and does not pretend to pose as the champion of the rights of others, he does say that it is of vital importance to the land owners of Virginia, as well as to the petitioner, to be relieved from the oppression caused by this one-sided and unconscionable statute.

When land has been seized and multilated under a statute, which restrains the owner as soon as the land is seized, the owner should not be forced to elect whether to resist the restraint or to attack the statute. Where an owner is restrained arbitrarily for one year and eight months, while his property is being mutiliated, it is a matter of grave importance that the owner, who attacks the statute in court at the earliest moment, is treated as a stranger to the statute and excluded from the court by a decision of the highest tribunal in the State.

The petitioner recognizes the importance of promoting the construction of suitable highways for modern traffic and of protecting the respondent from unnecessary hindrances, but he submits that the General Assembly of Virginia and the Supreme Court of Appeals have gone beyond all reasonable bounds in promoting and protecting the powers of the respondent. It is impossible to make even a dent in his armor of discretion or to assail the tremendous statutory powers by which he has become the dictator of condemnation procedure in the construction of highways.

Conclusion.

The petitioner begs to state in conclusion, and by way of summary, that the respondent has been granted the power to destroy the operation of the petitioner's mill, which is devoted to a public use and regulated by the Commonwealth of Virginia, although the respondent has admitted that the destruction could be reasonably avoided; the power to seize and mutilate the petitioner's property before instituting condemnation proceedings to ascertain its value; the exclusive power to determine the time for instituting proceedings to ascertain the value of the property, subject only to the limitation that he must institute proceedings within sixty days after completing the construction of the highway; the power to deposit in court what he alone considers that the petitioner should receive for the property and to compel the petitioner either to accept it or to wait until the respondent completes the highway, which he may do at leisure, and sixty days thereafter. This is eminent domain "running riot."

By the decision of the highest Court in the Commonwealth, the petitioner is not permitted to question the necessity for destroying the operation of his mill upon the specious reasoning that while the petitioner's mill is a public service enterprise it is different from other public service enterprises because the petitioner can destroy the operation of the enterprise at any time he sees fit to do so, and, therefore, the respondent can destroy the operation of the petitioner's enterprise at any time he sees fit to do so although he admits that he could reasonably avoid it; and the petitioner is not permitted to challenge the respondent's exclusive statutory control over the condemnation procedure for the alleged reason that the petitioner has not been injured by an unconstitutional feature of the statute, although the respondent admitted that he waited for one year and eight

months after he seized and mutilated the property before he instituted condemnation proceedings and that he was not prevented from instituting proceedings before he seized and mutilated the property or during the waiting period of one year and eight months, and although the statute restrained the petitioner and stripped him of the power to compel the respondent to act and stripped him of the power to act freely on his own motion.

For protection against these overwhelming powers and unyielding rulings, the petitioner seeks the aid of this Court, relying upon the due process and equal protection inhibitions of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, it is respectfully submitted that the petition should be granted.

BERNARD B. BAILEY, *pro se*.